No. 439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

HARRISON E. FRYBERGER,

Petitioner,

against

CONSOLIDATED ELECTRIC AND GAS COMPANY, a corporation, and CENTRAL PUBLIC UTILITY CORPORATION, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of Harrison E. Fryberger respectfully shows:

Summary and Short Statement of Matter Involved

The Pleadings

This is an action in equity brought by petitioner (plaintiff in the Court below) as creditor, in the New York Supreme Court of New York County on November 25, 1938, to recover the purchase price of 438 shares of Class A stock purchased in 1929 and 1930 of Central Public Service Corporation, a Maryland corporation (which will be herein

referred to for brevity as the C. P. S. Corp.), and to impress an equitable lien upon the assets of said corporation transferred as of August 1, 1932, and thereafter to Consolidated Electric and Gas Company, a corporation of the State of Delaware (which will be herein referred to for brevity as Consolidated) and which assets were also transferred nominally, and in part, to respondent Central Public Utility Corporation, a corporation organized under the laws of the State of Delaware (and which will be herein referred to for brevity as C. P. U. Corp.).

The complaint charges that said Class A stock was worthless and known by C. P. S. Corp. to be worthless at the time of its sale. That in 1929 the C. P. S. Corp. and its managing agents misappropriated proceeds from the sale of 355,631 shares of Class A stock, to wit, the sum of $14,900,000. Also that in the year 1929 the C. P. S. Corp. and its managing agents misappropriated the sum of $9,605,850 for the purpose of creating a fraudulent and fictitious supported market and that the Annual Financial Report of the C. P. S. Corp. for the year 1929 was a false, fraudulent and fabricated report (R. fols. 33, 50, 26). The complaint also charges that in the spring of 1932 and subsequently, plaintiff discovered that he had been defrauded and that in April, 1932, and subsequently, plaintiff served notice in writing of rescission of the purchase of the stock. That on May 6, 1932, plaintiff surrendered his certificates for the 438 shares to the C. P. S. Corp., R. fols. 42-44 (also see findings of Justice Lydon No. 101, R. fols. 398-399); that on August 1, 1932, C. P. S. Corp. entered into a fraudulent reorganization under and by virtue of which it transferred substantially all its assets of the actual value of $116,000,000 to Consolidated and that in equity, Consolidated assumed the payment of all the debts of the C. P. S. Corp., R. fols. 56-57. Prayer for relief, R. fols. 83-86.

Defendants in their answer pleaded three defenses: (1) The Statute of Limitations. This defense was stricken by the Court, R. fol. 1116. (2) Res judicata, based on the

proceedings in a certain suit commenced by the same plaintiff on November 3, 1933, in the New York Supreme Court against one N. W. Harris Company and four other defendants, which defendants included Consolidated and C. P. U. Corp. and which was tried before Justice Richard P. Lydon in 1935. This litigation will be referred to herein for brevity as the "Harris Case". (3) An alleged defense of res judicata based on certain proceedings commenced by the same plaintiff in May, 1937, against Consolidated, C. P. U. Corp. and another defendant in the Delaware Court of Chancery, R. fols. 98, 100-102.

Plaintiff did not serve a reply as he was not required to do so. But pursuant to motion of respondents and the order of the Court, plaintiff served and filed a reply in May, 1941, R. fols. 654-698. The case came up for trial and was tried before Mr. Justice John E. McGeehan, one of the Justices of the New York Supreme Court, on June 17th and 18th, 1941, R. fol. 703.

I

The undisputed facts in the Record exclude the possibility of the defense of res judicata or of any other defense by respondents.

A large amount of evidence was introduced and from this evidence there was at the close of the trial no dispute in the record as to the following facts: The C. P. S. Corp. was organized under the laws of Maryland in 1925, carried on its business with its headquarters in Chicago, Illinois, until August 1, 1932, at which time it ceased to do business. Between 1925 and August 1, 1932, the C. P. S. Corp. sold 2,270,053 shares of Class A stock to some 50,000 or more investors for which it received $78,998,514.70, R. Harris Case, fols. 1684-1685, and that said shares in the aggregate at the time they were sold were not worth a penny. At the time of the reorganization of August 1, 1932, it

was represented to these 50,000 claimants that the assets of C. P. S. Corp. which were not transferred to Consolidated, were of the value of $49,000,000, R. Harris Case, fol. 2565. Yet, as shown by the record in the Harris Case (R. fols. 3535, 3092, 3095) and by the documentary evidence introduced before Justice McGeehan, see R. fols. 824-831, Exhibits 6 to 12 inclusive.

Plaintiff's	Exhibit	6,	admitted	R.	page	275,	printed	page	321
"	"	7,	"	R.	"	275,	"	"	324
"	"	8,	"	R.	"	276,	"	"	325
"	"	9,	"	R.	"	276,	"	"	325
"	"	10,	"	R.	"	276,	"	"	328
"	"	11,	"	R.	"	277,	"	"	330
"	"	12,	"	R.	"	277,	"	"	330

The value of the entire assets retained could not exceed $28,000 and these were subject to a valid claim of the United States Government against the C. P. S. Corp. for back taxes in the sum of $800,000 and it was only by reason of the fact that the United States Government agreed to accept $100,000 in settlement of this valid claim, that the C. P. S. Corp. was permitted to assert that the assets retained were of the total value of $28,000. See R. Harris Case, fols. 3487-3492.

Between September 1, 1929, and November, 1930, plaintiff and his assignors purchased 538 shares of this Class A stock for which they paid $21,084.50. They sold 100 shares thereof on January 21, 1930, for $3,483 at a loss of $2,050, and they received $425.50 from the sale of certain stock dividends. See R. fols. 394-396. Also R. Harris Case, fol. 2024. This left a net investment of $17,176. See R. fols. 385, 388, 391-395.

An examination of finding No. 101, found at folios 397, 398, 399, discloses that Mr. Justice Lydon made specific findings; that in April, 1932, plaintiff and his assignors served a notice of rescission of the purchase of their 438 shares of Class A stock on the ground that they had discovered that they had been defrauded. For copy of written

notices, see R. Harris Case, fols. 3340-3352. These exhibits of plaintiff were marked in evidence as follows:

134	folio	2138,	printed	page	1114
135	"	2140,	"	"	1115
136	"	2142,	"	"	1117

At folio 399, Justice Lydon finds that plaintiff and his assignors on May 6, 1932, served a formal notice and demand of rescission and surrendered the certificates for these 438 shares of Class A stock. For copy of notice, see Harris Case, fols. 3353-3372, marked in evidence as Plaintiff's Exhibit 137 at fol. 2145.

As shown by R. Harris Case, fol. 3580, on May 18, 1932, the C. P. S. Corp. assigned and transferred these certificates for 438 shares of Class A stock to one of its subsidiaries, the Central Securities Transfer Company. As shown by the Plan of Reorganization, Part III, it was specifically provided as a part of the Plan that the assets of the Central Securities Transfer were to be and were assigned by C. P. S. Corp. and its subsidiary to the C. P. U. Corp., an adjunct and agent of Consolidated, and thereby the entire transaction involving the sale and purchase of these 438 shares of stock was cancelled by and with the consent of all parties concerned and as a legal effect of this provision in the Plan of Reorganization, Consolidated entered into a valid and binding agreement under which as a part of the purchase price of the assets trasferred to it, it assumed and agreed to repay plaintiff and his assignors what they had paid for these shares of stock, with interest at 6% from the date of purchase.

This part of the plan of reorganization, which is found R. fols. 1084-1085, is as follows:

> "Central Public Utility Corporation acquired all of the authorized Common stock of Consolidated Electric and Gas Company, consisting of 1,000,000 shares; and for 463,015 shares of its authorized Common stock Central Public Utility Corporation has acquired or

> will acquire from Central Public Service Company all of the outstanding Common stock of Central Public Service Corporation, consisting of 1,250,000 shares and all the outstanding Common stock consisting of 10 shares of Central Securities Transfer Company."

This plan was marked Plaintiff's Exhibit 139 in the Harris case and received in evidence at folio 2191; also marked as Plaintiff's Exhibit 17 in present record and received in evidence at R. fol. 856 found printed at page 347.

The record shows that C. P. S. Corp. transferred to Consolidated 1,999/2000ths of its assets, therefore, Consolidated in equity, assumed and agreed to pay these claims of plaintiff and his assignors. Also in legal effect, Consolidated is the C. P. S. Corp. simply under a change of name.

In a word, it appeared at the close of the trial before Mr. Justice McGeehan, that as a question of law, petitioner (then plaintiff) was entitled to judgment for the entire relief which he sought. During the trial, no ruling, no decision was made by Mr. Justice McGeehan as to the question of plaintiff's right to recover. On June 30, 1941, after the close of the trial, Mr. Justice McGeehan rendered a memorandum decision or ruling (R. fols. 1126-1127), in which he ruled that defendants were entitled to a judgment of dismissal of the complaint on the ground the defense of res judicata should be sustained. As this Court has held in the case of *Swift* v. *McPherson*, 232 U. S. 51 at page 55, if it be true that there was and is no evidence in the record tending to sustain the ruling, then such ruling constituted a denial of a Federal right arising under the laws of the United States. Therefore, this brings us to our next subdivision.*

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* This piece of litigation is complicated and petitioner believes he should save this Court as much unnecessary labor as possible. Therefore, in connection with Point I, petitioner cites the recent decision of this Court, *Chicago, M. & St. P. R. R. Co.* v. *Coogan*, 271 U. S. 472, which holds that on certiorari, this Court will examine the record and reverse for legal insufficiency of the evidence. There are many other points but perhaps the Court may consider that this point is enough.

II

Statement of Jurisdiction

This court has jurisdiction, as provided under Title 28, U. S. C. Section 344, and Section 237b of the Judicial Code, as amended by the Act of February 13, 1925, 43 Statute 937 U. S. Code, Title 28, Section 347 and subsequently which provide that where any right, title, privilege or immunity is set up or claimed by either party under the Constitution, etc., in a State Court, that the power of this Court to review by certiorari may be exercised as well where the Federal claim is sustained as where it is denied.

In the instant case, by the action of the Court below, the New York State Court deprived petitioner of a property right, to wit, of the value of over $31,000 exclusive of taxable costs and disbursements, the total value being more than $100,000, and in violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

The date of the decision and judgment of the New York State Court sought to be reviewed is July 20, 1943 and the date of this application is October 18, 1943. Petitioner fully complied with the provisions of the recent New York Statute found in Chapter 297 of the Laws of New York for the year 1942 which amended the New York Laws as to appeals to the New York Court of Appeals. On February 13, 1943, the Appellate Division, First Department denied permission to plaintiff to appeal to the New York Court of Appeals from the judgment of January 21, 1943 and on April 22, 1943, the New York Court of Appeals denied permission to plaintiff to appeal to said New York Court of Appeals from said judgment of January 21, 1943. Copies of said two last orders are printed herewith.

Under Rule 12 of this Court, the burden is on petitioner at this time to present decisions showing (1) that the Constitutional or Federal question involved is substantial and (2) that the Constitutional question or question of Federal right was duly raised and claimed before Mr. Justice McGeehan in proper and timely manner.

Assignments of Error

The Supreme Court of New York County, State of New York, erred in the following respects:

1) In holding as set forth in its memorandum decision of June 30, 1941, R. fols. 1126-1127, that respondents (defendants in the Court below) were and are entitled to have the present suit dismissed on the merits by reason of the defense of res judicata. There is no evidence in the Record tending to sustain this ruling.

2) In holding as set forth in its memorandum decision of January 14, 1942, R. fols. 1277-1280, that there is no Constitutional question and no question of Federal right involved in this case and that plaintiff had had his day in Court and in denying plaintiff's motion found at R. fols. 1132-1152, et seq., to vacate said memorandum decision of June 30, 1941, on the ground it deprived plaintiff of his property in violation of the Due Process Clause of the Fourteenth Amendment of the Federal Constitution.

3) At the close of the trial of June 17th and 18th, 1941, the undisputed evidence in the Record precluded the possibility of the defense of res judicata or any other defense by respondents and the Trial Justice erred in refusing to so hold.

4) An analysis of the so-called findings of fact found R. fols. 1282-1288 and the so-called conclusions of law found R. fols. 1288-1289 discloses that they are each and all mere baseless conclusions of law which are completely nullified by the real findings of Justice McGeehan found at R. fol. 1291 and by the basic facts of the Record as set forth in Point I. The Supreme Court of New York County erred in refusing to so hold.

5) As set forth in Point V herein, page 27 of this petition, the Record shows that these two respondents (defendants in the Court below) entered into a combination to nullify the proceedings instituted by petitioner before Mr. Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals in the so-called Harris Case, and the proceedings instituted by petitioner before the Delaware Court of Chancery, and respondents did so nullify such proceedings by the practice of misrepresentation and extrinsic or collateral frauds upon said Courts and succeeded thereby in preventing a fair submission of the controversy between petitioner and these respondents. The Trial Justice erred in holding that such practice of misrepresentation and frauds on said Courts is not a violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

6) The Trial Justice erred by the inclusion in his decision and judgment of February 11, 1942, the false and fraudulent affidavit of Arthur M. Boal, found at R. fols. 1270-1273 as set forth in R. fols. 1282-1289.

7) The Trial Justice erred in basing his decision and judgment found R. fols. 1270-1273, 1282-1289 upon the null and void proceedings had before Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals in the Harris Case and also the null and void proceedings before the Delaware Court of Chancery.

Questions Presented

There are four main Constitutional questions or claims of Federal right involved and intended to be set forth in this petition.

FIRST: As to res judicata.

(a) It is elementary that the doctrine of res judicata rests at bottom upon the ground that the party to be affected or some other with whom he is in privity has litigated or had an opportunity to litigate the same matter in a former action, in a Court of competent jurisdiction.

(b) It stands admitted on the Record that petitioner (plaintiff in the Court below) was not permitted to be heard either before Justice Lydon or the Appellate Division First Department, or the Court of Appeals or the Delaware Court of Chancery as to his present cause of action, to wit, as a creditor to recover the purchase price paid for certain shares of Class A stock in the C. P. S. Corp. and to establish an equitable lien on the assets transferred on August 1, 1932, in violation of his right.

(c) The value of petitioner's property right is far in excess of $31,000 if we include taxable costs, costs as between attorney and client and several years' time which petitioner was compelled to devote to the protection of his Constitutional rights.

(d) There is not a particle of evidence in the Record even tending to sustain the defense of res judicata.

(e) By the ruling and decisions of the Supreme Court of New York County, petitioner was deprived of said property right. The question involved is whether it was due process under the Due Process Clause of the Fourteenth Amendment for the New York Supreme Court of New York County to deprive petitioner of said property right.

SECOND: A second Constitutional question or question of Federal right involves the matter of the misrepresentation and frauds practiced by these respondents on Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals in the Harris Case and the Delaware Court of Chancery, by reason of which petitioner (plaintiff in the Court below) was prevented from securing from any of these Courts, a fair submission of his controversy with respondents. These frauds practiced may be divided into several classes: (a) Fraud in the jurisdiction. (b) Extrinsic or collateral fraud practiced on the Court. (c) Judgments which are the fruits of the fraud of respondents. The question to be determined is whether such systematic nullification of judicial proceedings by respondents in said Courts is or is not a violation of the Due Process Clause of the Fourteenth Amendment.

THIRD: A third Constitutional question and a question involving a claim of Federal right is raised by petitioner (plaintiff in the Court below) at R. fols. 676-677-678 and admittedly raised in his reply by petitioner at his earliest opportunity. This question involves the Full Faith and Credit Clause, namely, Article IV, Section 1 of the Federal Constitution.

FOURTH: The facts set forth in Point I raise still another Constitutional question and a question of Federal right but this has already been covered.

III

There are at least seven different grounds and reasons why it follows there is no evidence in the entire record even tending to sustain the defense of res judicata.

1. A comparison of the complaint in the present suit with the complaint in the Harris Case, discloses that the defense of "estoppel by judgment" would be impossible.

FIRST: The parties in the two suits are entirely different. There were five defendants in the Harris Case and two defendants in the present suit.

SECOND: The causes of action as shown in the complaint in the Harris Case are entirely different from the causes of action set forth in the complaint in the present suit. There were some 15 minor causes of action pleaded in the complaint in the Harris Case and only some 2 or 3 causes of action pleaded in the present suit. Moreover, in the present suit there is one cause of action involving 100 shares of Class A stock which was not even included in the Harris Case.

THIRD: The objects of the two suits are entirely different. The main object of the complaint in the Harris Case, while it was to secure a judgment against Consolidated, yet Consolidated being of doubtful financial standing, the main purpose was to establish a secondary liability against the N. W. Harris Company which was a rich, solvent Chicago, Illinois, corporation.

Budniskey v. *Arakelian*, 268 N. Y. 208-210-211.

FOURTH: These two respondents represented to Justice Lydon from the beginning of the trial until the close, that the cause of action involved as between plaintiff and Consolidated and C. P. U. Corp., was one by plaintiff as a stockholder for "rescission of contracts" (see R. Harris Case, fols. 5-2135, 2656-2699, 3110-3113) while plaintiff asserted throughout the trial (see R. Harris Case, fols. 2392-2398) that this particular cause of action was one by plaintiff as a creditor to recover the purchase price of said shares of stock and to establish an equitable lien on the assets transferred in fraud of his rights on August 1, 1932 and subsequently.

The distinction between (1) a suit by plaintiff as a stockholder for "rescission of contracts" and (2) a suit by plaintiff as a creditor to recover the purchase price of stock and to establish an equitable lien is striking.

A) In the former, the transfer of August 1, 1932, was valid. In the latter, it was void.

Northern Pacific v. *Boyd,* 228 U. S. 482.

B) In the former, the plaintiff could not attack such a transfer. In the latter, plaintiff could make such attack.

27 Corpus Juris 470.

C) In the former, the C. P. S. Corp. was an indispensable party defendant. In the latter, it was not.

Cobb v. *Interstate,* 20 Fed (2d), 786.

D) In the former, the matter of relief was discretionary with the Court. In the latter, it was not.

E) In the former, a Court could compel plaintiff to prove his case beyond a doubt. In the latter, a mere preponderance of evidence is sufficient.

18 Encyclopaedia of Pleading and Practise, 744 at p. 755.

F) Under the doctrine of equity, on the admitted facts, Consolidated assumed and agreed to pay the debts of C. P. S. Corp. including the claim of plaintiff and his assignors.

G) All of the 14 conclusions of law in the Harris Case are drawn on the theory that plaintiff still remained a stockholder of the C. P. S. Corp.

The observations of Mr. Justice Cardozo in *Kittredge* v. *Langley,* 252 N. Y. 405, 419, go even further. It was there pointed out that it is of no consequence whether or not, as a result of the reorganization, the debtor remains with some property in its hands. The conveyance of the debtor's other property is fraudulent as against existing creditors, so long as the purchaser takes with knowledge, or does not give the equivalent in value, as consideration. The familiar "trust fund" doctrine applied for the protection of creditors explains these rulings.

It is held by this Court in a leading case, namely, *Stark* v. *Starr,* 94 U. S. 477 at p. 486, that where there are two theories involved in a case:

> "A decision upon one could not possibly be a bar to proceedings upon the other, from their intrinsically distinct nature. Having required the complainant to proceed in that suit only upon one cause or ground for relief, the court left the other cause open for any future suit which they might choose to bring."

Also the same doctrine is held in *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, which states the familiar rule:

> "There is no reason why a party who failed in an attempt to recover on one theory because unsupported by the facts, should not be permitted to recover on another, for which the facts afford ample basis."

See also

Larme v. *Omnichrome,* 275 N. Y. 426-431.

FIFTH: It was asserted by these two respondents and they prevailed upon Justice Lydon to hold that the cause of action pleaded by plaintiff was one as a stockholder for "rescission of contracts" and that it could not be maintained for the reason that an indispensable party defendant, namely, C. P. S. Corp., the seller of the stock had been omitted, therefore, that the Court had no jurisdiction except to dismiss the case for want of jurisdiction. Therefore, the judgment entered could not have been "on the merits".

SIXTH: Again under the decision of the New York Court of Appeals, namely, *Schuylkill* v. *Nieberg,* 250 N. Y. 304, there were rights and interests in the Harris Case which were not involved in the suit tried before Mr. Justice McGeehan and there were rights and interests involved in the suit tried before Mr. Justice McGeehan which were not involved in the Harris Case. As stated in the case of

Sielcken v. *American,* 265 N. Y. 239, bottom of p. 243 and top of p. 244:

> "Indeed, in the pending action the plaintiff seeks redress for the transfer of some shares of stock not included within the allegations of the complaint in the California action. The causes of action are, thus, 'different not in form only, but in the rights and interests affected,' and they have not 'such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first'."

While it may be true that the answer of the defendants might be good as a pleading, see *Bell* v. *Merrifield,* 109 N. Y. 202, yet there was no evidence offered before Mr. Justice McGeehan which changed the law of the case. The authorities speak with one voice in support of this proposition.

See *Shields* v. *Barrow,* 17 How. U. S. 128, at p. 140 where the Court uses the following language:

> "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

See also:

Pocatello v. *Murray,* 21 Idaho 193;
Fulton v. *Hanlon,* 20 Cal. 450;
Barnett v. *Smart,* 158 Mo. 178, 59 S. W. 235;
Brown v. *McKie,* 185 N. Y. 303.

In *Pocatello* v. *Murray,* 226 U. S. 318, paragraphs 4 and 5 of the headnotes are as follows:

> "A court which is not empowered to grant relief whatever the merits may be, cannot decide what the

merits are, and a judgment sustaining a demurrer to and dismissing the bill on the ground of such lack of power is not res judicata on the merits."

"Where the judgment cannot be res judicata on the merits because the court has no power to grant relief, it is not made res judicata by reference to the opinion in which the court expresses its views on the merits."

The same rule is laid down in *Donahue* v. *New York Life*, 259 N. Y. 98-102, which holds that no finding and no conclusion of law has any force or effect as res judicata except that it is necessary to a decision of the case.

2. As to the defense of res judicata based on estoppel by verdict, there is not a particle of evidence in the record even tending to show that plaintiff's cause of action as a creditor was at any time decided in the Harris Case. On the contrary, Justice Lydon expressly limited himself to the theory that the cause of action involved was one by plaintiff as a stockholder for "rescission of contracts".

As held by this Court in *Russell* v. *Place*, 94 U. S. 606:

"If upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it where pleaded and nothing conclusive in it when offered in evidence."

The Appellate Division, First Department, as shown by R. Harris Case, fol. 3900, limited itself to the theory adopted by Justice Lydon. The New York Court of Appeals held there was no constitutional question involved and therefore it had no jurisdiction of the appeal in the Harris Case for the reason Justice Lydon and the Appellate Division had held that the cause of action involved was one by plaintiff as a stockholder for "rescission of contracts" while the cause of action pleaded was one by plaintiff as a creditor to recover the purchase price of stock and to establish an equitable lien. Therefore, the latter theory was left untried.

See *Fryberger* v. *Harris*, 273 N. Y. 115-117.

3. The Plan of Reorganization itself excludes the possibility of sustaining the defense of res judicata.

As is held in the case of *Schmid* v. *Klinck Packing Co., Inc.*, 189 N. Y. S. 543:

> "A seller of butter had the right to refuse to recognize the buyer's right to rescind, and to refuse to receive the butter back; but where it dealt with the butter returned, and sold it, such dealing amounted in law to a cancellation of the contract of sale, whether the butter was sold by sample or not, and whether the buyer had the right to return or not."

See also *Brewster* v. *Wooster*, 131 N. Y. 473.

Moreover, the entire defense of defendants who are respondents in the present suit, was based upon the Plan of Reorganization. The Plan of Reorganization itself excludes the possibility of sustaining the defense of res judicata.

The answer cites with approval finding of Justice Lydon No. 106, R. fols. 1084, 1085, reciting Part III of the Plan. Thus the answer of respondents does not even raise an issue.

4. Exhibit 13, which includes the brief of respondents in the Court of Appeals in the Harris Case and also the brief of these respondents in opposition to the granting of a reargument in the Court of Appeals in said Harris Case, offers conclusive proof that the Harris Case was tried by Justice Lydon, and was treated on the appeal by the Appellate Division, First Department, as one by the plaintiff not as a creditor but as a stockholder for rescission of contracts.

We here call attention to the following extracts from the brief of Consolidated:

At page 4 of this brief under the subhead of "Nature of the Action", the following language is used:

> "Plaintiff-appellant states in his brief that this is in the nature of a creditor's bill. The case was tried on the theory that it was an action for rescission."

From page 15 of said brief we quote as follows:

"POINT III.

This action is one for rescission and is not a creditor's bill."

At page 17 of said brief, the following language is used:

"POINT IV.

A decree of rescission will not lie against any of the defendants to this action because none of them were vendors of the stock sold or parties to the contracts sought to be rescinded."

At page 20 of said brief, the following language is used:

"The only remedy available to the plaintiff in equity is for rescission, etc."

At page 22 of said brief, the following language is used:

"POINT VII.

"None of the defendants are responsible for any of the liability of Central Public Service Corporation to the plaintiff-appellant."

We now refer to the brief entitled: "Brief in opposition to motion for reargument." This was a brief filed on behalf of all five defendants and respondents in the Harris Case in the Court of Appeals. On page 3 all these respondents, in referring to the decision of Justice Lydon, state:

"The Court ruled, first, that Central Public Service Corporation was a necessary party to determine the issue of rescission, etc."

At page 5 of this brief, the Court used the following language:

"The Court did find and rule that he (plaintiff) had not established a right to rescind the purchase of the stock and was therefore not a creditor of Central Public Service Corporation."

Here we have a formal judicial admission by these two respondents in the Harris Case in the New York Court of Appeals, that the entire proceedings before Justice Lydon including his judgment of October 14, 1935, were and are null and void and subject to collateral attack; also that all the proceedings in the Appellate Division, First Department, including its judgment of July 1, 1936, were and are null and void and subject to collateral attack. Therefore, it follows that the entire proceedings before the New York Court of Appeals including its judgment of January 27, 1937, are also null and void for want of jurisdiction. It also follows as a question of law that if all these proceedings in the Harris Case were null and void, it is axiomatic that the opinion of Chancellor Wolcott of May 25, 1938, in the Delaware Court of Chancery is also null and void and subject to collateral attack because it was based in toto upon the said proceedings in the Harris Case. It therefore follows that all these proceedings being null and void, there is not even a scintilla of evidence in the record tending to sustain the defense of res judicata.

5. The entire proceedings in the Delaware Court of Chancery were null and void and subject to collateral attack on several separate grounds.

(a) There was no trial in the Delaware Court. The proceedings went no further than the preliminary stage of pleading. These two respondents demurred to plaintiff's bill of complaint on the ground of res judicata and they based the defense in their demurrer upon the proceedings before Mr. Justice Lydon and upon the decision of the New York Court of Appeals. As shown by the Record, these two respondents by their counsel were guilty of misrepresentation and practiced a fraud on Chancellor Wolcott of such a nature that the opinion of Chancellor Wolcott was null and void and subject to collateral attack because the same was simply the fruit of the fraud of these two respondents. As shown by the demurrers interposed by

these two respondents in the Delaware Court of Chancery (found R. this case, fols. 1157, 1165-1166, 1175-1176), these respondents deliberately and intentionally and falsely and fraudulently represented to Chancellor Wolcott that the New York Court of Appeals had actually decided the cause of action of plaintiff as a creditor in the Harris Case, on the merits, when as shown by the records, the New York Court of Appeals dismissed the appeal for want of jurisdiction. Record folios 536-537, 542, 543-545, disclose that Chancellor Wolcott was tricked and deceived thereby. Therefore, there was fraud in the jurisdiction of such a nature as to render the entire proceedings in the Delaware Court null and void and subject to collateral attack. See *Lapiedra* v. *American Surety Co.*, 247 N. Y. 25; also citing *Mandeville* v. *Reynolds*, 68 N. Y. 528, 543, holding as follows:

> "Fraud and imposition invalidate a judgment as they do all acts, and may be alleged, whenever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment the fruits of his fraud; * * * judgment obtained by fraud upon a court, binds not such court or any other, and its nullity upon that ground though it has not been set aside or reversed, may be alleged in a collateral proceeding (*Webster* v. *Reid*, 11 How. (U. S. 437; *Cammell* v. *Newell*, 3 H. & N. 617-646; See 26 N. Y., Supra)."

(b) Moreover, as held by the Supreme Court of Delaware in the case of *Allied Chemical & Dye Corp.* v. *Steel & Tube Co.*, 12 Del. Ch. 368, 127 At. 414, under Rule 79 of the Rules of the Delaware Court of Chancery, which has the force of a statute, a complainant in a Delaware equity suit has the absolute right to dismiss or abandon his suit at any time before the case is called for actual trial and a witness is sworn.

In the case of *Postal Telegraph Company* v. *City of Newport,* 247 U. S. 464, it was held by this Court as follows (see headnote No. 1):

> "This court will review and correct the error of a State Supreme Court in assuming a state of facts without any support in the Record as a basis for denying asserted Federal rights."

At pages 475-476 the following language was used:

> "Waiving the doubt whether, under the particular facts of this case, the question of res judicata can be regarded as independent of the federal questions that were raised, we are of the opinion that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment * * *. The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 48; Greenleaf Ev., Sections 522-523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."

This decision is directly in point in the instant case for the reason that it appears that petitioner (as plaintiff in the Court below in the Harris Case) was not given an opportunity to be heard in the matter of litigating the cause of action pleaded, namely, his right as a creditor to recover the purchase price of stock purchased and to establish an equitable lien.

Also the recent case of *Shields* v. *Utah,* 305 U. S. 177, 182-185, holds that whenever a State Court makes a finding or a ruling or a conclusion of law or a judgment, without any substantial support in the Record, that such finding or ruling or conclusion of law or judgment, as the case may be, is "arbitrary and capricious" and in direct violation of the Due Process Clause of the United States Constitution, for they deprive plaintiff of his property without due process of law.

In the case of *Windsor* v. *McVeigh*, 93 U. S. 274:

> "A sentence of a Court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal."

Stated differently, this signifies that if a decision of a State Court is for any reason "arbitrary and capricious", that it is extra judicial, null and void.

See also:

Hansberry v. *Lee*, 311 U. S. 32, 41-45.

On certiorari this Court will examine the record and reverse for legal insufficiency of the evidence.

Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472.

IV

An analysis of the so-called findings of fact found R. fols. 1282-1288 and the so-called conclusions of law found R. fols. 1288-1289, discloses that they are each and all mere baseless conclusions of law which are completely nullified by the real findings of Justice McGeehan found at R. fol. 1291 and by the basic facts of the record as set forth in Point I.

As shown at R. fols. 1270-1273, Arthur M. Boal, counsel for respondents, filed with Mr. Justice McGeehan in January, 1942, his false and fraudulent affidavit sworn to December 15, 1941, in which he stated:

> "There is no doubt that the plaintiff instituted a prior suit for the same causes of action in this Court, also in the Chancery Court of Delaware. Both decisions were adverse to him and every issue here involved was there determined.

> The findings of fact which the plaintiff has presented are in large part the same ones which were presented to Mr. Justice Lydon and which he refused to make. Mr. Justice Lydon found that none of the allegations of fraud had been proved, the causes of action alleged had not been proved, and there was no basis for a rescission in fact or a rescission by decree."

We have already shown that these statements are utterly baseless and false and contrary to the undisputed evidence in the record. In addition we now refer to three additional findings made by Mr. Justice Lydon which nullify this affidavit of Mr. Boal. At R. fol. 386 in paragraph 94 of his findings, Justice Lydon uses the following language:

> "That W. G. Schanke and Co., although they knew that the market for said Class A stock was being supported, did not disclose to the said Helen Fryberger the fact that the said market was a supported market."

In paragraph 95, R. fols. 388-389, Justice Lydon made the following findings:

> "During said negotiations, W. G. Schanke and Co. did not disclose to the plaintiff the fact that the marketing of said Class A stock was being supported by the Central Public Service Corp."

And again, in paragraph 97 of his findings, R. fol. 393, Justice Lydon makes a similar finding as to Mrs. Clara F. Johnson.

As held in the case of *Seneca* v. *Leach*, 247 N. Y. page 1, this finding of failure to disclose is a finding of fraud of such a nature that plaintiff and his assignors were justified in serving notice of rescission just as they did. Nevertheless, Mr. Justice McGeehan was misled and subsequently he actually incorporated the substance of this false affidavit into his decision, and he proceeded to sign the alleged findings of fact found at R. fols. 1282-1288 and the conclusions of law I, II and III found at fols. 1288-1289. In paragraph 1 it is stated:

"In his decision Mr. Justice Lydon made one hundred sixteen findings of fact and fourteen conclusions of law and dismissed the complaint *on its merits.*"

Finding No. 6 is as follows:

"All the pertinent issues in the prior suit in this Court were decided adversely to the plaintiff; that is, it was decreed that he had failed to establish a right to a rescission of his purchase of the Class A stock of Central Public Service Corporation."

Finding No. 7 is as follows:

"Plaintiff then instituted a suit in the Chancery Court of the State of Delaware in which he made the same allegations, namely: that he had been induced to purchase this Class A stock of Central Public Service Corporation by fraud; that he had in fact rescinded the purchases, and was entitled to a lien on the assets of these defendants, which he claimed, had been transferred to them by Central Public Service Corporation. The Chancellor of the State of Delaware in a considered opinion held that the *issues involved in the New York suit were the same as those involved in the Delaware suit;* that these issues had been decided adversely to the plaintiff, and were a bar to the Delaware suit."

Finding No. 8 is as follows:

"Plaintiff offered in this case no evidence that was not before Mr. Justice Lydon in the prior suit in this court."

The conclusions of law are as follows:

I.

"The issues involved in this suit have all been decided adversely to the plaintiff in the prior suit in the Supreme Court of the State of New York and the suit instituted in the Chancery court of the State of Delaware, and are a bar to this action."

II.

"Plaintiff is estopped from trying a second time the issues decided against him in the prior suit in this Court."

III.

"Plaintiff is estopped from trying here the issues decided against him in the Chancery Court of the State of Delaware."

There are three answers which we desire to summarize. First: Justice McGeehan by his findings, found R. fol. 1291, completely discredited and nullified the statements contained in paragraphs 1, 6, 7 and 8 and conclusions of law I, II and III. Second: They are each and all discredited by the record to which we have referred. Third: These so-called findings are not findings at all but they are simply baseless conclusions of law or as to certain ones it might be said that they are baseless mixed questions of law and fact.

As stated by Simpkins Federal Practice, 1938 Ed., Section 963, page 684:

> "Ordinarily, findings of fact by state courts will not be questioned by the Supreme Court. But to this general rule there are two equally well-settled exceptions: (1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; and (2) where a conclusion of law as to a Federal right and finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal questions, to analyze the facts."

Also see cases in the notes.

As held by this Court in *Erie* v. *Purdy*, 185 U. S. 148-150, the question whether a claim of Federal right as presented is itself a Federal question and if properly raised in the court of first instance, example, the New York Supreme Court of New York County, it is not material if the New

York Court of Appeals refuses to pass on the constitutional question. That this Court will search the record in order to discover whether a constitutional question or a question of Federal right was duly claimed and will analyze alleged findings of fact in order to determine whether they are really conclusions of law.

First National Bank v. *Anderson*, 269 U. S. 341.

See:

Truax v. *Corregan*, 257 U. S. 312-324;
United States v. *Pink*, 315 U. S. 203-256;
Carlson v. *Curtiss*, 234 U. S. 103-106;
Norfolk v. *West Va.*, 236 U. S. 605-610 (Justice Murphy *Ex parte Hull*, 312 U. S. 546);
Carter v. *Texas*, 177 U. S. 442-447.

A question under the Full Faith and Credit provision of the Federal Constitution is a Federal question and such conclusion is not "open to doubt".

See:

In re Hanrahan's Will, 109 Vermont 108, 194 At. 473-6;
Brown v. *Fletcher*, 210 U. S. 82.

In *Riley* v. *New York Trust Co.*, 315 U. S. 343, it was held:

> "By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence."

On February 11, 1942, judgment was entered for the defendants, R. fols. 1294-1299. The notice of appeal to the Appellate Division, R. fols. 4-7, discloses that not only the judgment of February 11, 1942, but the order of January 14, 1942, were brought up for review. As shown by fols. 1339-1342, the Appellate Division entered an order of

affirmance on appeal from the judgment and order and the judgment of affirmance is found R. fols. 1343-1348. As shown by R. fols. 1333-1336, a notice of appeal from the judgment of January 21, 1943, also brought up for review the order and judgment of the Appellate Division affirming the order of January 14, 1942.

V

The record establishes that respondents practiced misrepresentation and extrinsic or collateral fraud upon Mr. Justice Lydon, the Appellate Division, First Department, and the New York Court of Appeals in the Harris Case; upon Chancellor Wolcott in the Delaware Court of Chancery and upon Mr. Justice McGeehan, the Appellate Division, First Department, and the New York Court of Appeals in the present suit, to such an extent that all the proceedings in the Harris Case and Delaware Court of Chancery and the judgments of Justice McGeehan, his order of January 14, 1942, the judgment of the Appellate Division, First Department, and the New York Court of Appeals are all null and void and subject to collateral attack.

This is true for the following reasons: said judgments are the fruits of the frauds of these respondents.

In the case of *Marine* v. *Hodgson,* 7 Cranch. 332-336, Chief Justice Marshall in describing and defining just what is meant by a judgment obtained or procured by fraud stated:

> "The judgment must be one of which it would be against conscience for the person who has obtained it to avail himself."

In *Dobson* v. *Pearce,* 12 N. Y. 156, the rule is stated as follows:

> "Fraud and imposition invalidate a judgment as they do all acts; and the fraud may be alleged when-

ever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment, the fruits of his fraud."

In the case of *United States* v. *Throckmorton*, 98 U. S., p. 61, paragraphs 2 and 3 of the headnotes are as follows:

"The frauds for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit."

"The cases where such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit."

In the case of *Wyman* v. *Newhouse*, 93 Fed. (2d) 313, which was sustained on certiorari by the Federal Supreme Court in 303 U. S. 664, it is held that a fraud affecting the jurisdiction, is the equivalent of a lack of jurisdiction. For the purposes of jurisdiction as herein referred to, there are three elements: (1) jurisdiction of the person, (2) jurisdiction of the subject matter, (3) jurisdiction to enter the particular judgment in question. Jurisdiction of the person is not involved in a discussion of this particular issue but jurisdiction of the subject matter is involved. Also jurisdiction to enter the particular judgment is also involved.

See also:

34 C. J., p. 565, Secs. 866-868.

The clearest definition we have found of the term "extrinsic or collateral fraud" is found in *Garrett* v. *Minard*, 82 Kansas 388, 108 Pacific 80, as follows:

"By extrinsic or collateral fraud for which a court of equity will set aside a judgment rendered by a court of competent jurisdiction, is meant some act or conduct

of the prevailing party which has prevented a fair submission of the controversy."

The subject of extrinsic or collateral fraud, especially in very recent years has become a vast special field of jurisprudence. Today, almost every state, every jurisdiction in the United States has accepted the definition of extrinsic or collateral fraud as set forth in the case of *Garrett* v. *Minard,* 82 Kansas 388, 108 Pac. 80.

In Volume II, Pomeroy's Equity Jurisprudence, Section 919, it is stated that all instances of this kind must be regarded as a fraud on the Court. A very exhaustive collection of the recent cases on this subject is found in 31 American Jurisprudence under the head of "Judgments" at Section 654.

Petitioner respectfully submits that it is the doctrine of extrinsic or collateral fraud which is at the foundation of the rule adopted by this Court as set forth in Simpkins Federal Practice 1938 at Section 963.

As Freeman on Judgments, 5th Ed. states at Section 1233, extrinsic fraud consists not of fraud in a cause of action but in the management of the case. The Record shows that these respondents by their misconduct, prevented Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals, the Delaware Court of Chancery in the Harris Case and also prevented Mr. Justice McGeehan, the Appellate Division, First Department and the New York Court of Appeals in the present suit from passing on the merits of the present cause of action.

See also 34 C. J. 471, 472, 473, Sections 739, 740, 741, and especially see Annotations for Corpus Juris for years 1940, 1941, 1942 and 1943.

Stade v. *Stade*, 315 Ill. App. 136 (Ill.);
Harjo v. *Johnston*, 104 Pac. 2nd 985 (Okl.);
Scott v. *Dilko*, 117 Pac. 2nd 700 (Cal. App.);
Mills v. *Baird*, 147 S. W. 2nd 312 (Texas);
Farley v. *Davis*, 116 Pac. 2nd 263 (Wash.).

VI

The main question left to consider is whether or not the plaintiff in the court below claimed the federal right above referred to or raised the constitutional question in a proper and timely manner. If he did, petitioner is entitled to have his petition granted.

It is well settled under the decisions of the New York Court of Appeals which is the highest Court in the State of New York, that a Constitutional question should be raised at the earliest opportunity or in any event at a time such that the trial Justice shall have the opportunity to correct his ruling while the matter is still under his control.

Matter of Pet., 98 N. Y. 447-452;
Cowenhoven v. *Ball*, 118 N. Y. 231-235;
Dodge v. *Cornelius*, 168 N. Y. 242;
People v. *Houghton*, 182 N. Y. 301-304;
Purdy v. *Erie*, 162 N. Y. 42;
Erie v. *Purdy*, 185 U. S. 148-150.

It is also well-settled by the decisions of the New York Court of Appeals that there are at least three methods by which a party aggrieved may raise a Constitutional question: (1) If a ruling of the Court is made on the trial of the case in a Court of first instance, that an objection and exception should be made and taken at the time. (2) That if a ruling is made by the Court of first instance, for example after the trial is adjourned, that the Constitutional question may be raised by motion.

Matter of Buffalo, 78 N. Y. 362;
In re Department, 85 N. Y. 301;
In re U. S., 66 How. Prac. 517;
Youngs v. *Goodman*, 240 N. Y. 470-473;
Bannon v. *Bannon*, 270 N. Y. 484-489;
Gleason v. *Thompson*, 245 N. Y. 509.

(3) In a proper case, a Constitutional question may be raised by the pleadings.

In the instant case, the first time petitioner (plaintiff in the Court below) had notice that respondents were intending to raise the defense of res judicata, was when their answer was filed January 23, 1939 (see R. fol. 103).

As shown by paragraph 7 of the reply at R. fols. 671-672, plaintiff made the claim that upon the undisputed evidence as shown by the Record in the Harris Case, the defense of res judicata would be impossible. We quote:

> "That as shown in R. Harris Case, fols. 5 to 12, Mr. Justice Lydon held that the Harris Case was an action in equity for rescission of contracts and at folio 12 he said:—
>
> > 'Even if these disputed facts were found in plaintiff's favor he could not succeed in the present action. I have therefore refused the requests for findings of both sides on the issue of fraud or falsity in the representations made to plaintiff and his assignors. (Since the Central Public Service Corporation is not a party to the action.)', etc."

And on appeal to the Appellate Division, the Appellate Division in their decision (found in R. Harris Case, fol. 3900) used the following language in describing the Harris Case:

> "Action for rescission of contracts."

As shown by paragraph 8 of the reply, R. fols. 675-676 et seq., plaintiff pleaded Article IV, Section 1 of the United States Constitution as follows:

> "Full faith and credit shall be given in each state to the public Acts, Records and judicial proceedings of every other state. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

Under the decisions of this court, if the judgment of Justice Lydon in the Harris Case was not "on the merits" then the opinion of the Delaware Court of Chancery must also treat the New York judgment as not on the merits, and in paragraph 10 of the reply, R. fols. 6(a) 1, 2 and 3, it is charged that respondents had taken advantage of the mortal illness of Chancellor Wolcott to practice a fraud upon the Court. The death of Chancellor Wolcott occurred November 8, 1938. As shown by R. fols. 934-935, when on July 8, 1938 it was called to the Chancellor's attention that there was no foundation for his opinion:

> "A. His face was red as fire, and he turned to Mr. Boal, who sat over across the table from me, and shook his head, and he said, 'This must be made right; this must be corrected. Now,' he says, 'I have been misinformed.' He said, 'Mr. Fryberger, I have never looked at the pleadings. I have never seen the pleadings. I have never seen the record in the New York suit; nothing at all.' He said, 'I have been misinformed.' And Mr. Boal's face was red indeed and he looked down at the floor and he did not look up at Chancellor Wolcott."

Almost immediately after June 30, 1941, Justice McGeehan left the jurisdiction and remained away from New York County until the latter part of the year 1941 and as shown by R. fols. 1132-1152, plaintiff as of the date December 9, 1941 served a notice of motion returnable December 16, 1941 in which motion he moved to vacate the memorandum decision of June 30, 1941 on the ground that this decision "deprived plaintiff of his property without due process of law and in violation of the Fourteenth Amendment of the United States Constitution and deprived plaintiff of his right to his day in Court on the questions involved in the action". Attached to the notice of motion is found the affidavit of the plaintiff (R. 1137-1152) and for instance, as shown by paragraph 7 of said affidavit, one of the chief grounds of the motion is:

> "There is no evidence in the Record which even tends to sustain the defense of estoppel by judgment or the defense of estoppel by verdict."

And paragraph 10 of said affidavit is as follows:

> "Deponent alleges that a Constitutional question is necessarily involved in said memorandum decision for the reason that the foundation of the doctrine of res judicata, or estoppel by judgment, is that both parties have had their day in Court. Said ruling therefore directly involves such Constitutional question. According to the understanding of deponent, he has no discretion, but is required to raise such Constitutional question now, or subject himself to the claim of waiver."

As shown by R. pages 425, 426 and 427, Justice McGeehan on January 14, 1942, filed a memorandum decision in which he denied the motion of December 9, 1941 in all respects.

As shown by R. fol. 1291, Justice McGeehan on January 12, 1942, made the following findings:

> "Except as incorporated in the defendants' Findings and Conclusions signed herewith and the items as 'Found' by Mr. Justice Lydon, all of the items contained in the plaintiff's submitted Findings and Conclusions are marked 'Refused' in accordance with the disposition made by this Court."

The effect of this finding was to make sweeping findings in favor of the plaintiff covering every issue of fact in the case.

If Justice McGeehan had stopped at that point, petitioner (plaintiff) would have been entitled to the entire relief which he sought in his complaint.

While the 116 alleged findings and 14 conclusions of law of Justice Lydon were null and void and could not be res judicata of anything, yet as shown by R. fols. 1189-1251, plaintiff made a motion before Justice McGeehan requesting him to make some 37 findings of fact and some 9 conclusions of law. These proposed findings were based upon

undisputed facts in the record. In response thereto, Justice McGeehan adopted all the basic facts found by Justice Lydon in favor of the plaintiff. And although these former findings of Justice Lydon were null and void, yet they were galvanized into life by these findings of Justice McGeehan found at R. fol. 1291 hereinbefore referred to.

We have already set forth references to the record which disclose that the constitutional question and claim of Federal right were duly set forth and presented to the Supreme Court of New York County, its denial by the Supreme Court of New York County, that the order of denial was duly presented for review to the Appellate Division, First Department, of denial, the appeal from this judgment to the New York Court of Appeals and its dismissal by the Court of Appeals solely on the ground that it believed that a constitutional question is not directly involved within the limit of meaning of its governing statute, C. P. A., Sec. 588, 1a, as interpreted by many authorities in that Court.

In the application of plaintiff to the Appellate Division, First Department, for leave to appeal, virtually the same matters were discussed concerning the constitutional question as are presented at this time. The Appellate Division, First Department, denied permission to appeal. Thereupon, petitioner (plaintiff in the Court below) prepared an elaborate printed affidavit and brief and an application to the Court of Appeals for leave to appeal and as shown by this printed application on file with the Clerk of the New York Court of Appeals, all these same grounds set forth why the constitutional question was involved, were presented. Thereupon, the Court of Appeals entered an order denying petitioner (plaintiff) permission to appeal.

In a word, in all these New York State Courts, petitioner's position has been the same as to one proposition namely, that the decision of the New York Supreme Court for one reason denies to plaintiff (this petitioner) his constitutional rights because, in sustaining the defense of res judicata without a particle of evidence to support it denies to petitioner (plaintiff) his day in court.

In addition, the charge that these two respondents were guilty of extrinsic or collateral fraud to such an extent that all seven judgments of all seven New York State Courts were null and void and subject to collateral attack was duly presented in all said New York State Courts.*

VII

Reasons relied upon for the allowance of the writ.

1. The Court below has decided a Federal question of substance in a way which is not in accord with the applicable decisions of this Court. It is believed that there are not less than 100 decisions of this Court, many of them recent decisions, which are directly in point and which hold in principle that a constitutional question of substance was set up by petitioner in the Court below but was denied or not given due recognition; that a claim of Federal right was properly set up by petitioner but was denied and not given due recognition, and that petitioner was and is entitled to invoke the jurisdiction of this Court on certiorari in order to determine such question and also determine whether the right was denied in direct terms or in substance and in fact.

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* Petitioner's "Assignments of error", the subdivision "Questions presented" and "Reasons relied upon for the allowance of the writ", in connection with his seven points, present quite a complete presentation of his position. Special attention is hereby called to petitioner's motion for leave to renew upon new and additional papers, the motion made by plaintiff for judgment at the conclusions of the trial in June, 1941. Under New York practice, the order denying this motion is appealable.

Carmody, Vol. VI, Sec. 34;
Seletsky v. *Third Avenue*, 44 App. Div. 632.

The matters contained in "Record on appeal", pp. 4-433 inclusive, were called to the attention not only of Mr. Justice McGeehan but also to the Appellate Division, First Department, and the New York Court of Appeals on motions for leave to appeal as well as on appeal.

2. Petitioner respectfully shows that the decisions, rul ing, conclusions of law and judgments of the New Yor State Courts were and are illegal, subversive in the ex treme and violative of the Due Process Clause of th Fourteenth Amendment to the Federal Constitution and o the Full Faith and Credit Clause of the Federal Constitu tion, and petitioner has been unable to discover any com parable instance anywhere in the jurisprudence of th United States since the adoption of the Federal Constitu tion in 1789, where the violation of the Federal Constitu tion and the violation of Federal right has been so acut or so pronounced and which has extended continuousl over a period of nearly ten years.

3. That petitioner has been unable to find any other in stance or case where for a period of ten consecutive year the respondents have practiced an extrinsic or collatera fraud upon judges of the New York State Courts an upon the Chancery Court of Delaware, the said judge embracing seven different courts and in this manner hav made use of legal proceedings to injure petitioner and t prevent him from securing a fair submission of the con troversy between the litigants.

In the case of *Verplanck* v. *Van Buren*, 76 N. Y. 247, is held:

> "Where parties, in pursuance of a conspiracy c combination for that purpose, fraudulently make u of legal proceedings to injure another, an action li against them at the suit of the person injured to r cover the damages sustained."

It appears by the Record that petitioner is a member a class of more than 50,000 potential claimants, who claims aggregate some $78,000,000. A denial of the pe tion would probably and almost necessarily signify a d nial of a very large percentage of these 50,000 claims b the granting of the petition would not at all necessari signify the allowance of any of the claims of the sa 50,000 claimants, for reasons set forth in Point I.

As held by *Hillyer* v. *LeRoy,* 179 N. Y. 369, petitioner is entitled to an equitable lien which takes effect as of August 1, 1932 and is prior to the subsequent bankruptcy proceedings and also prior to the claims of subsequent bondholders.

4. The value of the property rights of petitioner of which he has been deprived by the decisions, rulings alleged findings, alleged conclusions of law and judgments, is in excess of $31,000 not including taxable costs or costs as between attorney and client which are allowable in a typical creditor's bill such as this. That if actual expenses such as the printing of briefs and records, traveling expenses, attorneys' fees paid to other attorneys, were included, the property right in question would amount in value to far in excess of the $31,000. But in addition, petitioner has been compelled to devote more than five years of actual time during the entire ten year period, in defending himself from these extrinsic and collateral frauds above described. As we have already shown, there is not the slightest dispute in the Record but that these extrinsic, collateral frauds have been committed by respondents and that not only their local counsel but their general counsel have participated in the same. Obviously even the sum of $31,000 is not trivial and it is a sum petitioner cannot afford to lose and for the stronger reason, he cannot afford to lose the amounts of the subsequent items. It is not worth while to discuss the details of these latter items because they will be considered and proven in subsequent proceedings in the Court below. But the loss of all these items, great as they are, in the opinion of petitioner are even less serious than would be the endorsement or approval of a $78,000,000 swindle or the approval of the frauds upon the State Courts that have been practiced in this case, each one of which is a violation of the Due Process Clause of the Fourteenth Amendment.

5. The data as to the number of stockholders of C. P. S. Corp. and the general locality of their residence is set forth at page 11 of the C. P. S. Corp. Annual Report for the year 1931 as follows:

Number of Stockholders—Total	76,328
Eastern United States	16,583
Western United States	20,359
Southern United States	11,230
North Central United States	27,645
United States Possessions	37
Foreign	474

No claim is made by petitioner that the claims of any claimant, except that of petitioner, is up for review in this proceeding. The only purpose of referring to the data just cited is that it might possibly throw some light upon the importance of allowing the writ.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the New York Supreme Court of New York County in the State of New York to the end that the judgment of said New York Supreme Court may be reviewed and reversed by this honorable Court.

HARRISON E. FRYBERGER,
Counsel for Petitioner.